

# Late Notice May Be Equitably Excused Under Claims-Made-and-Reported Policies

---

May 2007

The United States District Court for the Northern District of California, applying California law, has held that a policyholder's failure to timely report a claim under a claims-made-and-reported policy to its primary and excess insurers could be equitably excused, thereby precluding summary judgment for the insurers. *Oakland-Alameda County Coliseum v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2007 WL 949687 (N.D. Cal. March 21, 2007). The court also denied summary judgment to the excess insurers because an issue of fact remained as to whether they had given the primary insurer's brokers ostensible authority to accept notice of a claim on their behalf.

The policyholder was a county stadium authority, which held a claims-made-and-reported primary D&O policy, as well as a number of excess policies. The policies expired at 12:01 a.m. on July 31, 1997. The stadium authority became embroiled in a dispute with the football team that played at the stadium. On the day the policies expired, the stadium authority mailed a "Notice of Claims and Circumstances" letter, which reached the primary insurer at 5:09 p.m. on July 31, 1997. On the same day, the stadium authority also mailed the letter to its insurance broker. Subsequently, the stadium authority sued the football team, and the football team counterclaimed against the stadium authority and one of its directors. The primary insurer denied coverage solely on the basis that the letter lacked sufficient detail to constitute notice of the claim. The primary insurer, however, agreed to defend the director under a reservation of rights. The stadium authority settled the underlying litigation by paying the football team \$22 million.

The insurers moved for summary judgment in the coverage litigation, arguing for the first time that notice of the claim was late because the stadium authority did not provide notice until after the policy expired at 12:01 a.m. on July 31, 1997, the last day of the policy period. Before addressing equitable excuse, the court rejected a number of arguments by the stadium authority.

First, the stadium authority argued that the policy expiration provision was ambiguous because it conflicted with a provision establishing a mailbox rule for notice. That provision stated that, "[i]f mailed, the date of mailing of such notice shall constitute the date that such notice was given, and proof of mailing shall constitute proof of notice." The stadium authority argued that because the mailbox provision specified a date but not a time, it created an ambiguity in relation to the policy expiration provision. The court found this interpretation

unreasonable because the two provisions addressed different concerns—one the *date* of notice by mail, the other the *time* of mailing on the last day of the policy period. Because the stadium authority chose to give notice on the last day of the policy period, it had to prove that the *date* and *time* of notice complied with the policy's requirements, which it failed to do.

The court next addressed the stadium authority's arguments that the primary insurer had waived its late notice defense. First, the stadium authority argued that the primary insurer had waived the defense by waiting nine years to raise the late notice issue in its summary judgment motion. But the court observed that waiver requires "some element of misconduct by the insurer or detrimental reliance by the insured," which was lacking here. Second, the stadium authority claimed that the primary insurer had waived the late notice defense by not including it in its written denial of coverage. The court disagreed, noting that "waiver requires the insurer to intentionally relinquish its right to deny coverage, and . . . a denial of coverage on one ground does not, absent clear and convincing evidence to suggest otherwise, impliedly waive grounds not stated in the denial." Having failed to prove waiver with clear and convincing evidence, the court denied the stadium authority's defense on that ground. Third, the court found no evidence of waiver in the primary insurer's acceptance of the director's defense because the primary insurer provided the defense subject to a reservation of rights.

The court also rejected the stadium authority's argument that the primary insurer was estopped from asserting its late notice defense. According to the court, estoppel requires proof of both misconduct by the insurer and reliance by the insured. The stadium authority claimed that if it had known the primary insurer would assert a late notice defense, it would have asserted claims against its counsel and the insurance broker. The court considered this a "convoluted argument" that presented an "unconvincing" scenario. The court held that this argument could prevail only if the stadium authority had alleged that the primary insurer knew that the stadium authority's counsel and insurance broker had committed errors. The stadium authority also sought estoppel by asserting that it would have purchased additional insurance if it knew that the primary insurer would deny coverage based on late notice. But the court pointed out that since the insurer had already denied coverage on other grounds, the stadium authority was not prevented from buying additional insurance.

The court found that the stadium authority's final argument, that the notice reporting requirement should be equitably excused, raised issues of fact that precluded summary judgment. Relying on *Root v. American Equity Specialty Insurance Co.*, 130 Ca. App. 4th 926 (2005), the court reviewed California's equitable excusal doctrine, which provides that "a trial court may equitably excuse the satisfaction of conditions in insurance contracts in order to avoid a forfeiture of coverage . . . where the reporting requirement functions as a condition rather than 'an element of the fundamental risk insured.'" *Id.* The court identified two key factual issues that precluded summary judgment for the insurers. First, it reasoned that, while litigation was first threatened in May 1997, the stadium authority's delay in notifying the carriers in the absence of an actual lawsuit could potentially be justified by its efforts to resolve the dispute short of legal action. Second, the court noted that the disputed issue of whether an optional extended reporting period was available to the stadium authority precluded summary judgment since the absence of an opportunity to purchase an extended

reporting period could excuse the late notice.

The court then addressed the additional arguments of the excess insurers. The excess insurers argued that even if notice was timely given to the primary insurer and the brokers, the primary brokers were not the agents of the excess insurers, and therefore, the stadium authority's notice to the brokers on the day the policies expired did not constitute timely notice within the policy period as to the excess insurers. In considering whether the excess insurers had an agency relationship with the broker, the court distinguished between insurance brokers, who did business with, but not for, an insurer, and insurance agents, who could be officially registered as the insurer's agent. Here, the court held that the brokers were not the actual agents of the excess insurers because they were not registered as such. But the court did find that the brokers could still have been the "ostensible agents" of the excess insurers with regard to the notice of claims under the policies. As such, an issue of fact remained as to whether the excess carriers, "through their 'acts or declarations,' caused or allowed [the stadium authority] to believe that the intermediaries acted as the excess carriers' agents," in which case the notice to the brokers would suffice.

Finally, the stadium authority argued that the excess policies were "claims-made" policies, rather than "claims-made-and-reported" policies, and that the notice-prejudice requirement therefore applied. The excess insurers argued that their policies followed form to the primary policy's "claims-made-and-reported" language. But the court found that the notice provisions differed between the primary and excess policies. The court therefore agreed with the stadium authority as to the excess policies, which required notice "as soon as practicable," because Ninth Circuit precedent established that policies with identical language were "claims-made" policies. The court, however, found that one excess policy, which imposed a sixty-day notice limit, followed form as to the primary policy's notice requirement and was, therefore, exempt from the notice-prejudice rule.